Nos. 03-1316, 03-1418

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

EDWARD ROSE & SONS, *et al.*;
DORCHEN/MARTIN ASSOCIATES, INC.;
ECKERT/WORDELL ARCHITECTS, P.C.;
GERALD PETERSON; JAMES R. SAULE,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States does not oppose Appellants' request for oral argument.

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JURISDICTIONAL STATEMENT

The Rose defendants'[1] jurisdictional statement is correct, although we note that the order granting the preliminary injunction was not entered until February 24, 2003 (Docket Sheet # 43, Apx. p. 11). This Court has jurisdiction over the Rose defendants' appeal (No. 03-1316) under 28 U.S.C. 1292(a)(1).

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[1] The "Rose defendants" refer collectively to Edward Rose & Sons; Edward Rose & Sons, Inc.; Edward Rose & Associates, LLC; Edward Rose & Associates, Inc.; Edward Rose Development Co., LLC; Edward Rose Realty, Inc.; Edward Rose Properties, Inc.; Occidental Development Co., LLC; Occidental Development, Ltd.; Huron Development, LP; and Green Ridge, LP.

The Architect defendants,[2] however, do not have standing to appeal. The injunction here pertains only to two properties (Westlake Apartments and Lake Pointe Apartments), both of which were designed by Alexander V. Bogaerts & Associates, P.C., which is not a party to this appeal (R. 53 First Amended Complaint at 5 (¶ 12), Apx. p. 64; Architect Br. 1 n.2).[3] The record contains no evidence that the Architect defendants were involved with those two properties or would perform any work related to those projects in the absence of an injunction. Indeed, the Architect defendants' counsel advised the district court that "Alexander Bogaerts is the architect who provided design services with respect to the two projects at issue" in the injunction, and "we recognize that the issue of [the] preliminary injunction is one primarily with which the Rose Defendants are concerned" (R. 49: 2/19/03 Letter at 1, Apx. p. 308). However, this Court need not decide at this time whether the Architect defendants have standing because their appeal (No. 03-1418) has been consolidated with that of the Rose defendants, which do have standing. See *Kelley v. Selin*, 42 F.3d 1501, 1510 (6th Cir.), cert.

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[2] The "Architect defendants" refer collectively to appellants Dorchen/Martin Associates, Inc.; Eckert/Wordell Architects, P.C.; James R. Saule; and Gerald Peterson.

[3] "Architect Br. __" refers to the page number of the Architect defendants' opening brief. "Rose Br. __" indicates the page number of the Rose defendants' opening brief. "NAHB Br. __" refers to the page number of the *amicus* brief filed jointly by the National Association of Home Builders, the National Multi Housing Council, and the National Apartment Association.

denied, 515 U.S. 1159 (1995). The issue would become relevant only if the Rose defendants' appeal were terminated prior to a merits decision by this Court.

STATEMENT OF THE ISSUE

Whether the district court abused its discretion in entering a preliminary injunction prohibiting the construction and occupancy of certain apartment buildings whose designs violate the Fair Housing Act because the paths leading to, and the areas immediately outside of, the primary entrances to individual ground-floor units would be inaccessible to persons with disabilities.

STATEMENT OF THE CASE

On September 3, 2002, the United States filed a complaint alleging that defendants had violated the Fair Housing Act, 42 U.S.C. 3601-3619, and Title III of the Americans With Disabilities Act (ADA), 42 U.S.C. 12181-12189, by failing to design and construct several apartment complexes to be accessible to persons with disabilities (R. 1 Complaint, Apx. pp. 16-29). The complaint named two sets of defendants: (1) the Rose defendants, a group of affiliated companies and partnerships engaged in the development, construction, and operation of apartment complexes, and (2) the Architect defendants, who had provided building designs for some of the apartment complexes covered by the United States' complaint, but not for the two complexes at issue in this appeal (*id.* at 2-5 (¶¶ 3-11), Apx. pp. 17-20). See p. 2, *supra*.

During the course of the litigation, the United States discovered that the Rose defendants were planning to proceed with construction of 19 inaccessible

buildings at two apartment complexes – Lake Pointe Apartments in Batavia, Ohio, and Westlake Apartments in Belleville, Michigan (R. 43 Order at 3, 23, Apx. pp. 35, 55). These proposed buildings are designed so that the primary entrance to each ground-floor apartment could be reached only by descending stairs. Consequently, the primary entrances would be inaccessible to wheelchair users and other persons with serious mobility impairments. Each ground-floor unit also would have an entrance at the rear of the building through the back patio door, which the Rose defendants claim would be accessible to wheelchair users (*id.* at 2-3, Apx. pp. 34-35).[4] See also pp. 6-7, *infra*.

On January 21, 2003, the United States moved for a preliminary injunction, asking the district court to enjoin the construction and/or occupancy of those 19 buildings until such time as the court could determine an appropriate remedy, or the parties could conduct discovery and reach an agreement on alternative designs and modifications to bring the planned dwellings into compliance with the Fair Housing Act (R. 43 Order at 3, Apx. p. 35; Docket Sheet # 27, Apx. p. 9). Specifically, the United States alleged that the paths leading to and the spaces immediately outside the primary entrances to the ground-floor apartments of the proposed buildings were "public use" and "common use" areas under 42 U.S.C.

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[4] The United States does not concede that all of the rear patio entrances in the 19 buildings would be wheelchair-accessible. Nonetheless, for purposes of the preliminary injunction only, the district court assumed that those back doors would be accessible to wheelchair users (*id.* at 7 n.5, Apx. p. 39).

3604(f)(3)(C)(i), and thus must be made accessible to persons with disabilities (R. 43 Order at 7, Apx. p. 39).

The district court granted in part and denied in part the United States' motion for a preliminary injunction (*id.* at 1, 5-17, 22-23, Apx. pp. 33, 37-49, 54-55). Specifically, the court ordered the Rose defendants (1) to "halt all construction activity on dwellings that are subject to the accessibility requirements of the Fair Housing Act" at the 19 buildings, and (2) to "refrain from occupying, via lease/rental agreements or otherwise" the ground-floor units of any of the 19 buildings whose construction was already complete (*id.* at 23, Apx. p. 55). The injunction defined "construction" to include "all efforts to obtain building and/or occupancy permits on those sites for which permits have not already been issued" (*ibid.*). However, the court denied the motion for a preliminary injunction insofar as the United States sought to prevent the Rose defendants from occupying the second and third floors of buildings whose construction had already been completed (see *id.* at 3 n.3, 16, 17, 23, Apx. pp. 35, 48, 49, 55).

The Rose defendants and the Architect defendants appealed (R. 50 Notice of Appeal, Apx. pp. 57-59; R. 65 Joint Notice of Appeal, Apx. pp. 74-76). The Rose defendants have filed a motion with the district court to stay the injunction pending appeal (Docket Sheet # 61, Apx. p. 12), but the court has not yet ruled on it.

STATEMENT OF FACTS

1. The proposed apartment buildings

The Rose defendants build, own, and manage apartment buildings in at least nine states, and are one of the largest real estate developers in the mid-western United States (R. 27 Exh. 5: Website printouts, Apx. pp. 136-139).

The district court's injunction covers a total of 19 buildings at two of the Rose defendants' apartment complexes: 12 buildings at Lake Pointe Apartments and seven at Westlake Apartments (R. 43 Order at 23, Apx. p. 55). Little, if any, construction has occurred on 11 of the 19 planned buildings; specifically, no foundations have been installed for those 11 buildings (R. 27 Exh. 1: 1/17/03 Letter at 1, Apx. p. 116). Three other buildings (Lake Pointe buildings 6-8) are in a more advanced stage of construction: their foundations have been laid and sewer and water lines have been installed (*ibid.*). Two additional buildings are nearly complete but the Rose defendants have not yet received occupancy permits for them (R. 59 Transcript at 27, Apx. p. 368). The Rose defendants have completed construction of, and obtained certificates of occupancy for, three of the 19 buildings (*ibid.*).

Each of the buildings is designed so that the primary entrances of the ground-floor apartments could be reached only by descending stairs. Each ground-floor unit also would have an entrance through a patio door located at grade level at the rear of the apartment building (R. 27 Exh. 6: Schoonover Declaration at 2-3 (¶¶ 5, 7), Apx. pp. 142-143; R. 27, Exh. 7: Sebastian

Declaration at 3-5 (¶¶ 7, 10), Apx. pp. 159-161; R. 27 Exh. 8: Stickley Declaration at 2-3 (¶¶ 5, 9, 11), Apx. pp. 192-193; R. 27 Exh. 9: Kelley Declaration at 4 (¶ 7), Apx. p. 206). At the bottom of the stairs leading to the primary entrances would be a landing shared by two apartments; the primary entrance to each apartment would open onto this shared space (see R. 27 Exh. 7 Att. 3: Lake Pointe architectural plans, Apx. pp. 166-171, 176-181; R. 27 Exh. 8: Table of Contents for Attachments, Apx. p. 195; R. 27 Exh. 8 Att. A: Westlake plans, Apx. pp. 197-198, 200, 202; see also R. 44 photograph (last page), Apx. p. 304 (showing shared landing at another Rose complex whose designs are similar to those at issue here)).

In each of these proposed buildings, the primary entrances would be directly across from, and close to, the parking lot – typically about 40 feet away. The rear patios doors, however, would be 100 to 430 feet from the nearest parking space (R. 43 Order at 2, Apx. p. 34; R. 27 Exh. 6: Schoonover Declaration at 2-4 (¶¶ 5, 8-10), Apx. pp. 142-144).

The Rose defendants have built some apartment complexes that do not have these accessibility problems. In other complexes that are not subject to the injunction, the Rose defendants have slightly modified their typical design to provide a path without steps to the primary entrance of each ground-floor apartment (*id.* at 3 (¶ 6), Apx. p. 143; R. 27, Exh. 6 Attachments 7 & 8: photos, Apx. pp. 155-156).

2. The district court's opinion

In entering the preliminary injunction, the district court first concluded that the United States had demonstrated a likelihood of success on the merits of its Fair Housing Act claim (R. 43 Order at 6-14, Apx. pp. 38-46). Specifically, the court held that the primary entrance to a ground-floor apartment is part of the "public use" or "common use" area and thus must be accessible to persons with disabilities under 42 U.S.C. 3604(f)(3)(C)(i). In reaching that conclusion, the court relied upon the long-standing interpretation by the Department of Housing and Urban Development (HUD), which the court found to be a "reasonable, permissible construction" that is "consistent with the letter and spirit" of the statute (R. 43 Order at 8, 12-13, Apx. pp. 40, 44-45).

The court rejected defendants' argument that the case was governed by 42 U.S.C. 3604(f)(3)(C)(iii)(I), which requires that "all premises within" covered dwellings contain certain accessible features, including "an accessible route into and through the dwelling." The court reasoned that § 3604(f)(3)(C)(iii) applied only to areas within a dwelling, not to the space leading to and immediately outside of the primary entrance, which was a public and common use area which must meet the accessibility requirements of § 3604(f)(3)(C)(i) (R. 43 Order at 13-14, Apx. pp. 45-46).

Next, the court held that because the Fair Housing Act expressly provides for preliminary injunctive relief, the United States was entitled to a presumption that irreparable harm would occur if the Rose defendants continued building

apartment complexes whose primary entrances to ground-floor apartments were inaccessible to persons with disabilities (*id.* at 7, 14-15, Apx. pp. 39, 46-47). In applying that presumption, the court found that the United States had "provided sufficient evidence that there ha[d] been a violation of the Act," and that "future violations [were] likely to occur" absent an injunction (*id.* at 15, Apx. p. 47). The court further concluded that defendants had failed to produce evidence rebutting the presumption of irreparable harm (*id.* at 15 n.9, Apx. p. 47).

The court then held that the "balance of harms weigh[ed] in favor" of the United States with regard to the ground-floor units of the apartment complexes (*id.* at 17, Apx. p. 49). The court noted that although it was "not oblivious to the potential financial repercussions of its ruling," it was "unaware of any case in which a Court ha[d] held that the potential financial burden of correcting unlawful discrimination outweighs the harm caused by allowing a party to actively engage in acts that Congress has identified as wrongful and injurious to an entire class of people" (*ibid.*).

Finally, the court concluded that a preliminary injunction would serve "the public interest by carrying out the stated policy of the United States * * * 'to provide, within constitutional limitations, for fair housing throughout the United States'" (*ibid.*, quoting 42 U.S.C. 3601).

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in issuing a preliminary injunction to stop the Rose defendants from constructing (and occupying the ground-floor units of) apartment buildings whose designs fail to comply with the accessibility requirements of the Fair Housing Act. These buildings are designed so that the primary entrance of each ground-floor apartment could be reached only by descending stairs, thus preventing wheelchair users and other persons with serious mobility impairments from reaching that entrance from the exterior of the apartment. The design of these proposed buildings violates 42 U.S.C. 3604(f)(3)(C)(i), which requires that the "public use and common use" areas of apartment complexes be accessible to persons with disabilities.

The paths leading to, and the spaces immediately outside of, the primary entrances of the ground-floor apartments are "public use" or "common use" areas because they are spaces designed to be used by the public and by other residents of the apartment complex to reach the front door of an apartment in order to visit, talk with, or deliver items to the tenants who live there. This reading of § 3604(f)(3)(C)(i) is consistent with the common usage of the terms "public use" and "common use" in the context of housing, with the plain language of HUD's regulations, and with HUD's longstanding, consistent, and reasonable interpretation of the statutory and regulatory language.

Because the Fair Housing Act expressly authorizes the award of preliminary injunctive relief, the district court had discretion to issue the preliminary

injunction so long as a reasonable probability existed that the Rose defendants had committed or were about to commit a violation of the Act. The United States showed, at the very least, a reasonable probability that the design of the 19 buildings violated the accessibility requirements of 42 U.S.C. 3604(f)(3)(C)(i).

Alternatively, the district court's decision should be upheld because a balancing of the equities weighs heavily in favor of the preliminary injunction. Such injunctive relief is particularly appropriate in this context because retrofitting non-compliant buildings after construction is complete is more expensive, burdensome, and time-consuming than modifying the plans before construction occurs. Allowing construction of non-compliant buildings during the pendency of this litigation would result in a significant waste of time and money because the Rose defendants would be required to undo the structural violations if they are ultimately found liable by the district court.

Moreover, constructing and occupying non-compliant buildings would perpetuate and prolong the discrimination against wheelchair users and others with mobility impairments, who would be required to travel much longer distances to reach their apartments than would other individuals who are not disabled. Requiring persons with disabilities to travel this added distance can increase their fatigue levels and perhaps even compromise their health by prolonging their exposure to the elements in inclement weather. These types of injuries are irreparable because they are hard to quantify in monetary terms and thus are difficult to remedy fully after the fact with an award of damages.

Finally, the equities weigh heavily against the Rose defendants because they proceeded to plan and start construction of non-compliant buildings, despite having actual notice that the federal government took the position that the type of design at issue here violated the Fair Housing Act. The Rose defendants thus knew they were proceeding at their own risk when they began these projects.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ISSUING THE PRELIMINARY INJUNCTION

This Court "reviews a challenge to the grant or denial of a preliminary injunction under an abuse of discretion standard and accords great deference to the decision of the district court." *Blue Cross & Blue Shield v. Columbia/HCA Healthcare Corp.*, 110 F.3d 318, 322 (6th Cir. 1997). The district court in this case did not abuse its broad discretion in issuing the preliminary injunction.

A. The Design of the 19 Proposed Buildings Violates the Fair Housing Act

The Fair Housing Act defines "discrimination" to include "a failure to design and construct" covered dwellings so that:

> (i) *the public use and common use portions of such dwellings* are readily accessible to and usable by handicapped persons;
>
> (ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

> (iii) all premises within such dwellings contain the following features of adaptive design:
>
> > (I) an accessible route into and through the dwelling;
> >
> > (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;
> >
> > (III) reinforcements in bathroom walls to allow later installation of grab bars; and
> >
> > (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

42 U.S.C. 3604(f)(3)(C) (emphasis added). Where, as here, the buildings have no elevators, only the ground-floor units must meet these accessibility requirements. 42 U.S.C. 3604(f)(7).

Under § 3604(f)(3)(C)(i), the "public use and common use" areas of an apartment complex include the path leading to, and the space immediately outside of, the primary entrance of a ground-floor apartment. This conclusion is consistent with the ordinary meaning of the terms "public use" and "common use" in the context of housing, with the plain language of HUD's regulations, and with HUD's longstanding interpretation of the Fair Housing Act and its own regulations. We believe this Court can decide the legal issue here without going beyond the plain language of the statute and regulations. But to the extent that any ambiguity exists, this Court should defer to HUD's reasonable interpretation of the statutory and regulatory language.

It is undisputed that the 19 buildings at issue in this appeal are designed so that the area leading to and immediately outside of the primary entrance to each

ground-floor unit is not accessible to persons with disabilities. These primary entrances can only be reached by descending stairs, thus effectively denying access to wheelchair users and other persons with disabilities who have serious mobility impairments. Consequently, the Rose defendants have failed to make "public use and common use" areas of its apartment complexes accessible under 42 U.S.C. 3604(f)(3)(C)(i).

1. The district court's interpretation of the Fair Housing Act is consistent with the ordinary meaning of the terms "public use" and "common use"

The district court's holding is consistent with the ordinary meaning of the terms "public use" and "common use" in the context of housing. The path to the primary entrance of an individual apartment is literally a "public use" or "common use" area because it is designed to be used by the public and other tenants to reach the front door of the apartment. This space will routinely be used by neighbors, outside guests, and uninvited strangers (such as couriers, petition gatherers, or trick-or-treaters) who wish to approach and knock on an apartment door in order to visit, talk with, or make deliveries to the tenants who reside in that dwelling. Visitors who wish to approach an apartment would most logically and naturally use the path to the primary entrance, rather than taking the liberty of entering the tenant's rear patio in order to knock on the back door. It is simply common custom for visitors to go to the primary entrance, rather than a more secluded

secondary or back door, when they approach another person's dwelling.[5] Thus, a path leading to the primary entrance of an apartment is a "public use" and "common use" area under the ordinary meaning of those terms even if that path services only a single unit of the building.

In the present case, the path to and the space outside of the primary entrance would serve two apartments, not just one. Under the existing designs, a stairway would lead down to a landing shared by two apartments whose primary entrances would be side-by-side. See p. 7, *supra*. Contrary to defendants' assertion (Rose Br. 19-20, 32), this space would not be under the exclusive control of the tenants of one apartment. The residents of one apartment cannot control which members of the public come down the stairs and onto the shared landing to reach their next-door neighbor's front entrance. Thus, under the ordinary usage of the English language, this space outside the front door of the apartments is a common and public use area.[6]

---

[5] Defendants' assertion (Rose Br. 42) that the back patio door is, in fact, the primary entrance is unsupported on this record. The front door to each apartment faces the parking lot and is much closer to that lot than is the patio door. It is reasonable to expect that most residents and visitors would try to reach the apartment by approaching the front door near the parking, rather than going around to the back to the less obvious patio entrance.

[6] *Amici* incorrectly argue (NAHB Br. 21) that interpreting "public use" and "common use" areas to include the path to primary entrances would logically require upper-floor hallways and walkways to be accessible, thus effectively prohibiting multi-story dwellings without elevators. Such upper-floor hallways and walkways need not be accessible because the statute makes clear that only ground-floor units in buildings without elevators are subject to the accessibility

(continued...)

2. The district court's holding is consistent with the plain language of HUD's regulations

In 1989, HUD issued final regulations to implement the 1988 amendments to the Fair Housing Act, including the accessibility requirements of 42 U.S.C. 3604(f)(3). Those regulations include broad definitions of "common use areas" and "public use areas" that literally encompass the path to, and the area immediately outside of, the primary entrance of an individual apartment. Specifically, HUD's regulations state that

> "Public use areas" means interior or *exterior* rooms or spaces of a building that are made available to the general public. Public use may be provided at a building that is privately or publicly owned.

24 C.F.R. 100.201 (emphasis added). Similarly, the regulations provide that

> "Common use areas" means rooms, spaces or elements inside or *outside of a building* that are made available for the use of residents of a building or the guests thereof. These areas include hallways, lounges, lobbies, laundry rooms, refuse rooms, mail rooms, recreational areas and *passageways among and between buildings.*

Ibid. (emphasis added). The paths to, and the areas immediately outside of, the primary entrances of the ground-floor apartments are "exterior * * * spaces" "outside of a building" that are "made available to the general public" and "made available for the use of residents of a building or the guests thereof." *Ibid.* Members of the public, residents, and guests use this exterior space to reach the

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[6](...continued)
requirements. See 42 U.S.C. 3604(f)(7).

front door of an individual unit in order to visit, talk with, or deliver items to the tenants who live there.

Defendants do not challenge the validity of the HUD regulations themselves or the broad definitions set forth in those regulations. The regulations, which were promulgated through notice-and-comment rulemaking pursuant to express congressional authorization,[7] are entitled to deference. See *Meyer v. Holley*, 123 S. Ct. 824, 830 (2003) (HUD is "the federal agency primarily charged with the implementation and administration of the [Fair Housing Act]" and courts "ordinarily defer to an administering agency's reasonable interpretation of a statute"). The definitions in the HUD regulations are reasonable interpretations of the statutory language because they are consistent with the ordinary usage of the terms "common use" and "public use" in the context of housing. See pp. 14-15, *supra*.

Defendants nonetheless suggest (Rose Br. 28, 32) that the HUD regulations do not support the district court's holding because they do not expressly mention the space outside of a primary entrance in the list of examples of "common use areas." That argument is flawed in several respects. First, even if the path to the primary entrance did not fall within the regulation's definition of "common use area," it would still meet the regulation's broad definition of "public use area"

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[7] See Pub. L. No. 100-430, § 13, 102 Stat. 1636 (1988) (HUD secretary "shall * * * issue rules to implement [the Fair Housing Act] as amended by this Act. The Secretary shall give public notice and opportunity for comment with respect to such rules.").

because it is used by the public to approach the front door of an apartment. See 24 C.F.R. 100.201. Second, by using the word "include" before the list of examples of "common use" areas, see 24 C.F.R. 100.201, HUD signaled that the list was intended to be "illustrative and not exclusive." 54 Fed. Reg. 3232, 3243 (Jan. 23, 1989). Third, the paths to the primary entrances of individual apartments appear to be part of the network of "passageways among and between buildings," which the regulation lists as examples of common use areas, because those paths are typically connected to sidewalks that link one apartment building to another. See *Webster's Third New International Dictionary* at 1650 (1967) (defining "passageway" as "a way that allows passage to or from a place or between two points: CORRIDOR, PATH"). Finally, the path to the primary entrance of an individual's apartment is at least analogous to the "hallways" and "passageways" cited in the definition, because all of them are spaces designed to allow residents, guests, and other visitors to move from one part of the apartment complex to another.

3. HUD's reasonable, consistent, and longstanding interpretation of the statute and its own regulations confirms the correctness of the district court's holding

The district court's holding is also consistent with HUD's longstanding construction of the statutory and regulatory language. In issuing its proposed regulations for public comment in 1988, HUD explained that under the regulations, "[h]andicapped persons should be able to enter a newly constructed building through an entrance used by persons who do not have handicaps." 53

Fed. Reg. 44,992, 45,004 (Nov. 7, 1988). HUD subsequently issued Fair Housing Act Accessibility Guidelines, see 56 Fed. Reg. 9497 (Mar. 6, 1991), and published commentary about those Guidelines in the Federal Register. In that commentary, HUD interpreted the statutory and regulatory terms "public" and "common use" areas in order to explain to builders and designers which portions of an apartment complex must be made accessible. Specifically, HUD stated on numerous occasions starting in the early 1990s that "public use" or "common use" areas include the path leading to and the space immediately outside of the primary entrance of an individual apartment. See 56 Fed. Reg. 9472, 9487-9488 (Mar. 6, 1991) ("approaches to, and maneuvering spaces at, the exterior side of the entrance door to an individual dwelling unit would be considered part of the public spaces" that must be made accessible); 55 Fed. Reg. 24,370, 24,380 (June 15, 1990) (same); 56 Fed. Reg. at 9488 ("Lever hardware is required for *entry doors* to the building and *to individual dwelling units* because *these doors are part of the public and common use areas*, and are, therefore, subject to the [accessibility] provisions for public and common use areas") (emphasis added); 59 Fed. Reg. 33,362, 33,366 (June 28, 1994) ("The exterior side of the main entry door [to an individual unit] is part of the public and common use areas," subject to the accessibility requirements for such areas, whereas "[t]he interior of the main entry door is part of the dwelling unit"); see also HUD's Fair Housing

Accessibility Guidelines, 56 Fed. Reg. at 9505 (listing "entrances" among the examples of "common-use spaces and facilities").[8]

In 1998, HUD reiterated this longstanding interpretation in its Fair Housing Act Design Manual, which provides technical assistance to designers and builders in complying with the statute's accessibility requirements:

> The exterior of the primary entry door of covered dwelling units is part of public and common use spaces, therefore, it must be on an accessible route and be accessible * * *. This is true both of entry doors opening off interior corridors internal to a building containing multiple dwelling units, and of separate exterior ground floor dwelling unit entrances.

(R. 27 Exh. 4: Design Manual at 3.10, Apx. p. 135). The Design Manual also contains an illustration remarkably similar to the design used by the Rose defendants, with an inaccessible primary entrance directly across from the parking lot and a rear patio on the other side of the building. The Manual states unequivocally that this design violates the Fair Housing Act and that merely providing access to the patio door would not be sufficient (*id.* at 1.28, Apx. p. 133 (diagram labeled: "NOT Acceptable – Lacks an Accessible Route to a Primary

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[8] In the face of these clear statements, defendants emphasize the following ambiguous sentence in the HUD Accessibility Guidelines concerning requirements for the width of doorways: "On accessible routes in public and common use areas, and for primary entry doors to covered units, doors that comply with ANSI 4.13 would meet this requirement." 56 Fed. Reg. at 9506. Defendants assert (Rose Br. 41) that the phrase "*and* for primary entry doors" indicates that those doors are not part of "public and common use area[s]." Whatever ambiguity is created by this passage in the Guidelines is dispelled by HUD's more explicit comments set forth in the text of this brief.

Entrance Door"); *ibid.* ("simply adding an accessible route to the secondary, rear entry is not acceptable as that results in 'back door' access").

HUD reiterated this position again in January 1999, in response to questions submitted by three major trade associations – the National Association of Home Builders, the National Multi Housing Council, and the National Apartment Association. HUD explained that the interpretation set forth in the Design Manual was consistent with the position that the agency had articulated in 1988 in the preamble to its regulations, where it had stated that "persons with disabilities should be able to use the same entrance that will be used by persons without disabilities" (R. 36 Exh. 3: Response at 3-4, Apx. pp. 283-284 (citing 53 Fed. Reg. at 45,004)). In its response to the trade associations, HUD emphasized that "[u]sing a patio or secondary door as the accessible entrance sets different terms and conditions for persons with disabilities, and frequently results in requiring persons with disabilities to take long, circuitous routes just to get into their dwellings" (*id.* at 4, Apx. p. 284).

To the extent that this Court finds any ambiguity in the statute or regulations, it should defer to HUD's reasonable interpretation. See *Meyer*, 123 S. Ct. at 830 (relying on HUD regulations and commentary in Federal Register in interpreting Fair Housing Act); *Barnhart v. Walton*, 535 U.S. 212, 218 (2002) (deference where statute is ambiguous); *Takacs v. Hahn Auto. Corp.*, 246 F.3d 776, 782 (6th Cir.) (deference where regulation is ambiguous), cert. denied, 534 U.S. 889 (2001). Deference is especially appropriate here since HUD has

consistently articulated the same position for well over a decade. See *Barnhart*, 535 U.S. at 220 (courts "normally accord particular deference to an agency interpretation of 'longstanding' duration").

Defendants and their *amici* argue, however, that HUD's interpretations do not warrant deference because they are set forth in the Accessibility Guidelines (or the preamble to those Guidelines) and the Design Manual, which are not intended to establish mandatory requirements (Rose Br. 38-41; NAHB Br. 7-8, 12-17). That reasoning is flawed.

Defendants and their *amici* are confusing two distinct issues: (1) which areas of apartment complexes and other covered dwellings must be made "accessible" under the Fair Housing Act and the HUD regulations?, and (2) what are the acceptable ways to make those areas accessible? See 65 Fed. Reg. 15,740, 15,743 (Mar. 23, 2000) (explaining this distinction and emphasizing that although builders have flexibility as to "technical criteria" in achieving accessibility, they must still look to the statute and regulations to determine which elements or spaces must be made accessible). It is true that the technical design specifications set forth in the Accessibility Guidelines and Design Manual are not mandatory, but merely establish a safe harbor illustrating one acceptable way of achieving accessibility in those areas of an apartment complex that must be made accessible under the Fair Housing Act. See 56 Fed. Reg. at 9473, 9479; R. 27 Exh. 4: Cuomo letter at 1, Apx. p. 129. In other words, builders and designers have the option of using alternative design methods if they would achieve the same level of

accessibility in the areas of an apartment complex that are subject to the Act's requirements. See 56 Fed. Reg. at 9473, 9478-9479; 59 Fed. Reg. at 33,362. But builders and designers do not have such flexibility in deciding which areas of an apartment complex are covered by the Act. Thus, for example, if a space qualifies as a "public use" or "common use" area within the meaning of § 3604(f)(3)(C)(i), it *must* be made accessible. We are not asking the Court here to defer to HUD's technical design specifications for achieving accessibility of covered areas. Instead, the Court should defer to HUD's reasonable interpretation of the terms "public use" and "common use" areas in determining which portions of an apartment complex are covered by 42 U.S.C. 3604(f)(3)(C)(i).

4. This case is governed by 42 U.S.C. 3604(f)(3)(C)(i), not by 42 U.S.C. 3604(f)(3)(C)(iii)

Defendants argue (Rose Br. 25-27, 29-30) that their only relevant statutory obligation in this case is to provide "an accessible route into and through the dwelling" pursuant to 42 U.S.C. 3604(f)(3)(C)(iii)(I). They contend that the back patio door provides such an accessible route, and thus they have fully complied with the requirements of the Fair Housing Act. Defendants are mistaken.

Section 3604(f)(3)(C)(iii) provides that:

> all premises *within such [covered] dwellings* contain the following features of adaptive design:
>
> (I) *an accessible route into and through the dwelling*;
>
> (II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

> (III) reinforcements in bathroom walls to allow later installation of grab bars; and
>
> (IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

42 U.S.C. 3604(f)(3)(C) (emphasis added). As the district court emphasized, the plain language of § 3604(f)(3)(C)(iii) limits its coverage only to the premises "within" dwellings (R. 43 Order at 13-14, Apx. pp. 45-46). The problem at issue here is that the path from the parking lot to the primary entrance of each dwelling and the space immediately outside that entrance are inaccessible to persons with disabilities. Those spaces are part of the "public use" and "common use" areas, not premises "within" a dwelling. Adopting defendants' interpretation of § 3604(f)(3)(C)(iii) would require the Court to read the phrase "premises *within* such dwellings" out of the statute.

In an attempt to avoid the limiting language of § 3604(f)(3)(C)(iii), defendants argue (Rose Br. 20, 22-23, 34) that the word "dwellings" in the phrase "premises within such dwellings" refers collectively to the entire apartment complex, rather than to individual dwelling units. Thus, defendants reason, the area leading to the primary entrance of an individual unit is covered by § 3604(f)(3)(C)(iii) because that space is within the apartment complex as a whole. Defendants' reasoning is flawed.

First, defendants' strained reading is contrary to HUD's regulations, which reasonably interpret the statutory phrase "premises within such dwellings" to refer to the premises within individual dwelling *units*. Specifically, the regulation

implementing § 3604(f)(3)(C)(iii) requires that "[a]ll premises within" covered "dwelling *units*" must contain certain "features of adaptable design," including "[a]n accessible route into and through the covered dwelling unit." 24 C.F.R. 100.205(c)(3)(i) (emphasis added). Thus, to the extent that the term "dwellings" in 42 U.S.C. 3604(f)(3)(C)(iii) is ambiguous, the HUD regulations clarify that it refers to individual "dwelling units," not collectively to the apartment complex as a whole. Defendants have not challenged the validity of this regulation, which was promulgated pursuant to notice-and-comment rulemaking and is entitled to deference.

Second, the requirement of an "accessible route into and through" the dwelling appears in a subsection with other accessibility requirements that plainly pertain to the interior of an individual unit – *i.e.*, kitchens and bathrooms, outlets and environmental controls, and reinforcements for grab bars in bathrooms. See 42 U.S.C. 3604(f)(3)(C)(iii)(II)-(IV). It is thus reasonable to read the "accessible route" requirement of that subsection as also applying to features inside the dwelling unit, not to the public and common areas outside of it.

Defendants nonetheless suggest (Rose Br. 26, 35) that § 3604(f)(3)(C)(iii)'s reference to a route "*into* * * * the dwelling" necessarily means that the provision covers the exterior path leading to the unit's entrance. Defendants are mistaken. A design feature that is *within* a dwelling can prevent individuals with disabilities from entering *into* that dwelling. For example, a set of stairs immediately inside the front door of an individual apartment would have the practical effect of

preventing a person in a wheelchair from entering *into* that apartment, even though the stairs are entirely *within* the unit.

Next, defendants and their *amici* argue (Rose Br. 21, 31; NAHB Br. 20) that the district court's interpretation of "public use and common use" areas under § 3604(f)(3)(C)(i) would render superfluous not only § 3604(f)(3)(C)(iii)(I) (requiring "an accessible route into and through the dwelling") but also § 3604(f)(3)(C)(ii) (width of doors "designed to allow passage into and within all premises within such dwellings"). In fact, the district court's interpretation gives effect to each of the subsections of 3604(f)(3)(C), which impose separate accessibility requirements that work in tandem. Specifically, (C)(i) ensures that a person with a disability can get to the front door; (C)(ii) requires that the doorway be wide enough for a wheelchair; and (C)(iii) – which addresses the private spaces "within" a dwelling – ensures that the dwelling is constructed such that a person with a disability can get into the unit from the common and public use space immediately outside the front entrance and then move through the dwelling.[9]

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[9] Defendants argue (Rose Br. 20-21, 34-35) that 42 U.S.C. 3604(f)(4) indicates that Congress did not intend (C)(iii) to apply only to interior accessibility requirements. That contention is meritless. Section 3604(f)(4) simply provides that compliance with certain accessibility standards adopted by the American National Standards Institute (ANSI) will "suffice[] to satisfy the requirements" of § 3604(f)(3)(C)(iii). See 42 U.S.C. 3604(f)(4). The ANSI standards contain technical specifications that apply to the interior of dwelling units, among other areas. See ANSI A117.1-1986, § 4.32 ("Dwelling Units") at 65-73 (reprinted in addendum to this brief). Because ANSI includes such requirements, Congress's designation of ANSI as an acceptable means of complying with (C)(iii) is consistent with interpreting (C)(iii) to apply to features within an individual

(continued...)

Defendants also argue (Rose Br. 31-33, 35-36) that the HUD regulations' definition of "accessible route" to include both exterior and interior routes, see 24 C.F.R. 100.201, is inconsistent with reading the "accessible route" requirement of § 3604(f)(3)(C)(iii)(I) to apply only to premises "within" individual dwelling units. There is no inconsistency. Defendants' argument is premised on the mistaken assumption that the term "accessible route" occurs only in the portion of the HUD regulation implementing § 3604(f)(3)(C)(iii) – *i.e.*, only in 24 C.F.R. 100.205(c)(3)(i). In fact, the phrase "accessible route" also appears in another portion of the HUD regulation (24 C.F.R. 100.205(a)), which encompasses outdoor routes and has no relevance to § 3604(f)(3)(C)(iii). Exterior routes must be made accessible because they qualify as public and common use areas under 42 U.S.C. 3604(f)(3)(C)(i), not because they fall within § 3604(f)(3)(C)(iii). See HUD Accessibility Guidelines, 56 Fed. Reg. at 9505 (examples of "[a]ccessible route[s]" that qualify as "[p]ublic and [c]ommon [u]se [a]reas" include exterior routes from the parking spaces to the building itself).

5. Defendants' other arguments are meritless

a. 42 U.S.C. 3604(f)(5)

Defendants argue (Rose Br. 23-25; Architect Br. 9-17) that the district court's holding conflicts with 42 U.S.C. 3604(f)(5), which provides, in relevant part, that:

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[9](...continued)
dwelling unit.

> (A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C) [*i.e.*, § 3604(f)(3)(C)], compliance with such laws shall be deemed to satisfy the requirements of that paragraph.
>
> (B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

42 U.S.C. 3604(f)(5)(A) & (B). Defendants assert that Ohio and Michigan have incorporated the Fair Housing Act's accessibility requirements into their state civil rights codes, and thus local officials' approval of some of the building designs at issue here means that they comply with federal law.

This argument is meritless. The Fair Housing Act states that "[d]eterminations by a State or a unit of general local government under [§ 3604(f)(5)(A) & (B)] shall not be conclusive in enforcement proceedings" under the Act. 42 U.S.C. 3604(f)(6)(B). Therefore, even if state or local officials had certified that the Rose properties complied with the Fair Housing Act (or its state law analog), the United States could still prevail by showing – as it has – that such a determination would be contrary to the statutory language, the HUD regulations, and HUD's reasonable and longstanding interpretations of the statute and regulations.

At any rate, defendants have failed to cite any evidence that a state or local official actually certified that the building designs complied with the Fair Housing Act or the analogous state civil rights codes. Issuance of building permits does not necessarily signify that local officials have analyzed designs for compliance

with the civil rights laws. Indeed, the local official who issued permits for certain buildings at Westlake Apartments stated that he did not make a determination before issuing those permits that the designs satisfied either the Fair Housing Act or the analogous Michigan civil rights statute (R. 74 Exh. 4: Kelley Declaration at 2 (¶¶ 2-3), Apx. p. 325).

b. Legislative history

Defendants incorrectly assert (Rose Br. 27-30) that the district court's interpretation conflicts with the following passage from the legislative history:

> The first requirement is that the public and common use portions of such dwellings be readily accessible to and usable by handicapped persons. This means that hallways, lounges, lobbies, passageways among and between buildings and other common areas and facilities not contain barriers to entrance and use by handicapped persons.

H.R. Rep. No. 711, 100th Cong. 2d Sess. 26 (1988). Defendants emphasize (Rose Br. 28) that this passage does not explicitly mention the space outside the primary entrance as a public or common use area. However, the House Committee plainly did not intend this list to be exhaustive because it included the catch-all phrase "and other common areas." At any rate, as previously explained, the paths to exterior front doors of apartments are either part of the network of "passageways among and between buildings" or at least are analogous to such passageways. See p. 18, *supra*.

Defendants also highlight the statement in the House Report that § 3604(f)(3)(C)(i) "requires that one regular entrance to such [public and common use] areas be accessible to handicapped persons for the same purpose for which it

is used by others," but "does not require that all entrances be made accessible to handicapped persons" (Rose Br. 28, quoting H.R. Rep. No. 711, *supra*, at 26). This portion of the House Report simply makes clear that if there are multiple entrances to a public and common use area, only one of those entrances needs to be accessible. It does not purport to define what a public and common use area is. This passage from the House Report would apply, for example, to a situation where there were two ways to enter the path leading to the front door of the apartment – steps and a wheelchair-accessible ramp. In that situation, the public and common use area (*i.e.*, the path to the front door) would comply with the statute even though not all entrances to the path would be accessible. In the present case, by contrast, the paths to the ground-floor units are completely inaccessible to wheelchair users and thus violate § 3604(f)(3)(C)(i).

For these reasons, the design of the 19 buildings at issue in this appeal violates the Fair Housing Act.

B. The District Court Had Discretion to Enter a Preliminary Injunction Because the United States Demonstrated at Least a Reasonable Probability That a Statutory Violation Had Occurred or Was About to Occur

Where a statute expressly authorizes courts to grant injunctive relief to halt or prevent a violation, "traditional equitable criteria do not govern the issuance of preliminary injunctions" under that statute. *CSX Transp., Inc. v. Tennessee State Bd. of Equalization*, 964 F.2d 548, 551 (6th Cir. 1992); accord *United States v. Miami Univ.*, 294 F.3d 797, 817 (6th Cir. 2002). Instead, a court has discretion to

enter a preliminary injunction so long as "there is 'reasonable cause' to believe" – in other words, "a reasonable probability" – that a violation of the statute has occurred or will occur. *CSX*, 964 F.2d at 551, 555-556. Under these circumstances, a court can issue preliminary injunctive relief without inquiring into the existence of irreparable harm or other equitable factors. See *id.* at 550-551; *Mical Communications, Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1035 (10th Cir. 1993).

This standard applies here because the Fair Housing Act expressly authorizes preliminary injunctive relief in actions brought by the Attorney General. Specifically, district courts have authority in such cases to "award such preventive relief, including a permanent or temporary injunction, restraining order, or other order against the person responsible for a violation of [the Act] as is necessary to assure the full enjoyment of the rights granted by [the statute]." 42 U.S.C. 3614(d)(1)(A). This provision is substantively equivalent to the statutory language at issue in *CSX*, which authorized courts "to grant such mandatory and prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain, or terminate" any violations of the statute. 964 F.2d at 550. Therefore, as in *CSX*, preliminary injunctive relief is appropriate here so long as there is a reasonable probability that a statutory violation has occurred or will occur.

At the very least, the United States has demonstrated a reasonable probability that the design of the 19 proposed buildings violates the Fair Housing

Act. See pp. 12-30, *supra*. The district court thus acted within its discretion in issuing a preliminary injunction to stop or prevent the violation.

C. Even if the Traditional Equitable Factors Applied Here, the District Court Did Not Abuse its Discretion In Issuing the Preliminary Injunction

As we have explained, the district court was under no obligation to consider traditional equitable factors before issuing the preliminary injunction. See pp. 30-32, *supra*. Nonetheless, a preliminary injunction would be warranted even if the traditional equitable test were applicable here.

Under traditional equitable principles, a court typically balances four factors in deciding whether to issue a preliminary injunction:

> (1) whether the movant has a strong likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction.

Michigan Bell Tel. Co. v. Engler, 257 F.3d 587, 592 (6th Cir. 2001) (citation omitted). None of these factors is a prerequisite for the award of injunctive relief, and thus a strong showing on one factor can make up for a weaker showing on others. See *ibid.*

These equitable factors weigh heavily in favor of a preliminary injunction in this case. At the very least, the United States has demonstrated a strong likelihood of proving that the designs of the 19 buildings violate the requirement of 42 U.S.C. 3604(f)(3)(C)(i) that public and common use areas be accessible to persons with disabilities. See pp. 12-30, *supra*. The remaining equitable factors, which

essentially involve a balancing of the relevant benefits and harms of a preliminary injunction to the public and the affected parties, also strongly support the district court's decision.

Preliminary injunctive relief is particularly appropriate in the context of proposed new construction because of the practical difficulty of correcting structural violations if the buildings are found to be non-compliant after the construction has been completed. Once new buildings are constructed with non-compliant features, undoing the violations could prove complicated, time-consuming, and quite expensive. By preserving the status quo pending a decision on the merits, the preliminary injunction helps avoid the considerable waste of time and resources that would occur if the Rose defendants construct non-compliant buildings and then are required, after entry of final judgment, to undo the structural violations.[10]

Although the Rose defendants claim that the injunction subjects them to a significant monetary loss (Rose Br. 7, 10 n.1, 48, 51),[11] any lost revenues that

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[10] Defendants overstate the scope of the injunction (Rose Br. 7, 51), incorrectly asserting that it prohibits occupancy of the second- and third-floor units in those buildings where construction is complete. In fact, the district court made clear that the injunction did not prohibit occupancy of units on the second and third floors of buildings whose "construction" – as defined in the court's order – had already been completed (see R. 43 Order at 3 n.3, 16, 17, 23, Apx. pp. 35, 48, 49, 55).

[11] The Rose defendants base this assertion on a conclusory affidavit that fails to adequately explain the method by which the calculation was made or the data on which it was based (see R. 62 Exh. A: Myers Affidavit at 2 (¶ 8), Apx. p. 318).

(continued...)

might occur as a result of the injunction must be balanced against the significant expenses that the Rose defendants would incur if they went ahead and constructed non-compliant buildings and then were ordered to correct the accessibility problems at the conclusion of the litigation. Modifying the plans for the buildings before they are constructed is undoubtedly less expensive and burdensome than retrofitting non-compliant buildings after construction is complete.

Moreover, defendants have the power to minimize any monetary losses by simply agreeing to construct the buildings that are not yet built so that the front entrances are accessible. The United States repeatedly emphasized to the defendants and to the district court that its goal was not to halt construction but simply to ensure that the buildings were constructed to meet the accessibility requirements (R. 59 Transcript at 19-20, 54-55, 57, Apx. pp. 360-361, 394-395, 397). If defendants will agree to construct the buildings so that the front entrances are accessible, the United States will support modification of the injunction to allow such construction to proceed, and we would expect, based on the district court's comments at the injunction hearing, that such modification would be ordered (see *id.* at 41, Apx. p. 381 ("Well, the Government I think is not asking you to stop construction or to lay off people, * * * but to construct the buildings in a manner that is in compliance with the statute. How does that involve laying off people?")). The Rose defendants have demonstrated that they can feasibly

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[11](...continued)
The affidavit is therefore entitled to little weight.

construct apartment buildings so that the primary entrances of the ground-floor apartments are accessible. They have already done so at other apartment complexes by slightly modifying their typical design to provide a path without steps to the primary entrance of each ground-floor apartment. See p. 7, *supra*.

At any rate, there is doubt whether the Rose defendants would be allowed to construct some of the buildings at issue in this appeal even if the injunction were lifted. The planning director for the township where the Westlake Apartments are located informed the Rose defendants in November 2002 that the township would not issue building permits for four of the buildings at issue in this appeal (Westlake buildings 7-10) because their failure to provide accessible front entrances violates the building code now in effect in that jurisdiction (R. 27 Exh. 9: Kelley Declaration at 3-5 (¶¶ 7-8), Apx. pp. 205-207). Moreover, Michigan has adopted the International Building Code, which, as the Rose defendants concede, requires developers to provide an accessible route to the primary entrances of individual apartments (Rose Br. 23 n.16; R. 33 Defendants' Joint Brief at 18-19 n.9, Apx. pp. 219-220; R. 33 Exh. 12: International Building Code § 1107.5.5, Apx. p. 223; Appellants' Brief Addendum in No. 03-1316, Tab 6 (Michigan rule incorporating International Building Code)). Ohio also has adopted the International Building Code (Ohio Admin. Code 4101:1-1-01 (§ 101.1)), and the local code official in the Ohio jurisdiction in which the Lake Pointe Apartments are location has stated that his office now reviews building

plans for compliance with that international code (R. 27 Exh. 7: Sebastian Declaration at 2 (¶¶ 2-3), Apx. p. 158).

The equities also weigh heavily against the Rose defendants because they proceeded to plan and construct buildings with inaccessible front entrances despite ample warning that the federal government took the position that the paths leading to, and the spaces immediately outside of, the primary entrances were public and common use areas that must be made accessible. As previously noted, HUD explicitly publicized this interpretation on numerous occasions since 1990. See pp. 19-21, *supra*. The Rose defendants have long had actual notice of HUD's position. In May 1998, the National Association of Home Builders (NAHB), a prominent trade association, sent the Rose defendants a letter explicitly advising them that HUD took the position that the type of design at issue in this appeal – often called a "split level" design – violated the Fair Housing Act's accessibility requirements (R. 74 Exh. 2 Att. A: 5/20/98 Letter at 1-2, Apx. pp. 322-323). NAHB's letter warned defendants that "it may be difficult to prevail on the issue of whether the building you have described meets the intent of the accessibility requirements, since split level entries are prohibited by the Fair Housing Act" (*id.* at 2, Apx. p. 323). Moreover, during discovery in the present case, the Rose defendants produced handwritten notes from an April 1998 fair housing seminar which stated: "'Accessible entrance must be primary entrance': HUD" (R. 78 Exh. 1 Att. A: Notes at ERS 025492, Apx. p. 332). This provides additional

evidence that the Rose defendants had actual notice of HUD's interpretation since at least early 1998.

Indeed, the Rose defendants started construction of some of the buildings at issue here well *after* the United States had filed suit against them in Indiana in January 2001 challenging the same type of design that is at issue here, and even after the United States had filed its complaint in the present action on September 3, 2002. See, *e.g.*, R. 27 Exh. 9: Kelley Declaration at 3 (¶ 5), Apx. p. 205 (building permits were issued for Westlake building 13 in October 2002 and for buildings 11 and 12 in June 2001); R. 27 Exh. 7: Sebastian Declaration at 3 (¶ 7), Apx. p. 159 (building permit for Lake Pointe building 8 was issued on August 30, 2002). In light of the clear warning they had of the federal government's position, the Rose defendants undoubtedly knew they were proceeding at their own risk by starting construction of those buildings. Having voluntarily assumed that risk, they cannot now legitimately complain about losses attributable to their own conduct. See *Baker v. Adams County/Ohio Valley Sch. Bd.*, 310 F.3d 927, 930 (6th Cir. 2002) ("Indeed, especially when a party knew of the risk that it undertook when it undertook the enjoined activity, monetary losses from the complying with the injunction will seldom be irreparable. * * * Any cost that is a result of the defendant's action during the course of this litigation * * * clearly could not be considered as part of the defendant's harm.").

Balanced against any inconvenience to the Rose defendants is the substantial and irreparable harm to persons with disabilities. Allowing the Rose

defendants to proceed during the pendency of this litigation with the construction (or occupancy of the ground-floor units of) non-compliant buildings would cause and prolong discrimination against persons with disabilities. Aside from the indignity and inconvenience of being denied access to their own front doors and being relegated to the back of the building, wheelchair users would be forced to travel much longer distances to reach their apartments, as compared to non-disabled residents and visitors. Whereas the primary entrance to the ground-floor units is only about 40 feet from the parking lot, the back patio doors would, in some instances, be more than *10 times* that distance from the parking spaces. See p. 7, *supra*. For persons with serious mobility impairments, this added distance could increase their fatigue level and perhaps even compromise their health, especially during inclement weather. Many persons with disabilities "can move at only very slow speeds," and on trips of over 100 feet, they

> are apt to rest frequently, which substantially increases their trip times. Resting periods of 2 minutes for every 100 [feet] can be used to estimate travel times for people with severely limited stamina. In inclement weather, slow progress and resting can greatly increase a disabled person's exposure to the elements.

(R. 27 Exh. 2: ANSI A117.1, App. A4.3 (1986), Apx. p. 125). Such intangible injuries are deemed "irreparable" because the nature of such losses "would make damages difficult to calculate." See *Miami Univ.*, 294 F.3d at 819; *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992).

Finally, the preliminary injunction serves a compelling public interest by preventing unlawful housing discrimination from occurring. As the Supreme

Court recently acknowledged, the anti-discrimination objective of the Fair Housing Act is an "overriding social priority." *Meyer*, 123 S. Ct. at 831; see also *Price v. Pelka*, 690 F.2d 98, 102 (6th Cir. 1982) ("eradicating housing discrimination" serves the "public interest"). Thus, the balance of the equities weighs heavily in favor of the preliminary injunction.

CONCLUSION

This Court should affirm the order granting the preliminary injunction.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B). The brief was prepared using Wordperfect 9.0 and contains 9,977 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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(Page 1 of 2)

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APPELLEE'S JOINT APPENDIX DESIGNATIONS

Description of Entry	**Record Entry No.**	**Appendix Page No.**
District Court Docket Sheet		1
Complaint	1	16
The following exhibits to Plaintiff United States' Motions for Leave to File an Amended Complaint, for Entry of a Preliminary Injunction, and Brief in Support:	27	
Exhibit 1 – the following document only:		
Letter dated 1/17/03 from Andrew Sandler, Counsel for Rose Defendants, to Harvey Handley III, U.S. Department of Justice		116
Exhibit 2: Excerpts of ANSI A117.1-1986		119
Exhibit 4: Excerpts of Fair Housing Act Design Manual (including letter from Andrew Cuomo)		126
Exhibit 5: Printouts from websites		136
Exhibit 6: Declaration of Kenneth Schoonover (including all attachments)		141

Description of Entry	Record Entry No.	Appendix Page No.
The following exhibit to United States' Supplement Based on Newly Discovered Evidence to its Response in Opposition to the Rose Defendants' Motion to Modify, Stay, Dissolve, or Suspend Enforcement of Preliminary Injunction Pending Appeal:	78	
Exhibit 1 – the following excerpts only:		
Declaration of Erin Meehan Richmond (pp. 1-2)		327
Attachment A to Richmond Declaration: Notes bates stamped ERS-025478-025480, 025492		329

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